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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY
PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE APPELLANTS IN OPPOSITION TO THE MOTIONS TO DISMISS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

Fritz R. KAHN,
General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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The appellees—National Association of Recycling Industries, *et al.* (NARI), Institute of Scrap Iron and Steel, Inc. (ISIS), and Environmental Defense Fund, *et al.* (EDF)— move to dismiss on the ground that this Court has no jurisdiction of this direct appeal from an order of a three-judge district court vacating and remanding a final order of the Interstate Commerce Commission.[1] They contend that 28 U.S.C. 1253 authorizes direct appeals only from three-judge district court decisions which grant or deny injunctions, and, since there is here no appeal from the denial by the court below of the injunction against the collection of the new rates, jurisdiction does not lie under 28 U.S.C. 1253.

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[1]Appellees' other contentions are answered in our Jurisdictional Statement.

This contention is without merit, as demonstrated both by the legislative history of the statutes involved and the consistent practice of this Court.

The legislative history of 28 U.S.C. 2321-2325, governing the enforcement and review of Commission orders, as well as of 28 U.S.C. 1253, indicates that Congress treated actions to set aside, annul, or vacate and remand ICC orders and actions for injunctions against their enforcement as functionally equivalent, and intended to make no distinction in the procedures applicable to them.

Sections 2321-2325 derived from the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220, (the "Expediting Act") which specified that:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted [except by a three-judge district court]. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case * * * ; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree * * * .

The language of the Expediting Act was carried forward in the various versions of the Judicial Code before 1948. See, *e.g.*, 28 U.S.C. (1940 ed.) 47, 47a.

When the Judicial Code of 1948 was enacted into positive law, the present statutory language first appeared. While the introductory language (28 U.S.C. 2321) used the traditional terms for describing the review jurisdiction, the three-judge provision (28 U.S.C. 2325) now referred, telescopically, to an action for "[a]n interlocutory or permanent injunction" instead of the previous separate references to orders "granting or denying * * * an interlocutory injunction" and suits to "suspend or set aside." Similarly, 28 U.S.C. 1253, providing for direct Supreme Court review, referred, generically, only to orders granting or denying injunctions in civil actions required to be heard by a three-judge court.

Nothing in the brief legislative history of the 1948 revision suggests that any change in the three-judge requirement and direct appeal provisions was intended.[2] Rather, the history indicates that the procedural structure for review of ICC orders was to remain unchanged.

The reviser's notes, printed as an Appendix to the House Report, indicate that harmony with the Expediting Act of 1913 was intended in Sections 2321-2325. H. Rep. No. 308, 80th Cong., 1st Sess., A183, A184.[3] Similarly, the reviser's note to 28 U.S.C. 1253 states that it was designed merely to consolidate the earlier provisions "relating to direct appeals from decisions of three-judge courts involving orders of the Inter-

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[2]An intent to make substantive changes in such a codification of the laws will not be inferred in the absence of a clear legislative expression of such intent. *United States* v. *Ryder*, 110 U.S. 729, 740.

[3]The change in formulation apparently was because the Expediting Act provisions regarding composition and procedures in the three-judge district courts were included in 28 U.S.C. 2284, and the provisions for direct appeal to this Court were covered in 28 U.S.C. 1253, and, as regards the time for appeal, in 28 U.S.C. 2101. *Id.* at A184.

state Commerce Commission" with other direct appeal provisions. *Id.* at A106. The note states that the Section is based on, *inter alia,* 28 U.S.C. (1940 ed.) 47 and 47a, which as noted p. 2, *supra,* contained the Expediting Act language permitting direct review of all three-judge district court orders setting aside ICC orders.

The legislative history thus indicates that 28 U.S.C. 1253 should not be read as limiting the right of direct appeal to cases in which a district court in terms enjoins the enforcement of an ICC order. Instead, that Section was intended to apply also whenever a district court vacates and remands, or otherwise sets aside, an ICC order.

This Court has consistently so applied 28 U.S.C. 1253. For example, in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 409 U.S. 1005, 412 U.S. 800, it noted probable jurisdiction and decided on direct review a case in which a three-judge court had not in terms enjoined an ICC proceeding, but instead suspended the proposed charges and remanded the proceeding to the Commission. See *Wichita Board of Trade* v. *United States,* 352 F. Supp. 365, 369 (D. Kan.).

Indeed, the question of the equivalence of an action to set aside an ICC order and an action to enjoin such an order was raised by the Court *sua sponte,* and decided, in *Electronic Industries Association* v. *United States,* 401 U.S. 967. There, a three-judge court had dismissed a suit challenging a general revenue order of the Commission on the ground that the plaintiff shippers had failed to exhaust their administrative remedies. *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D.D.C.). On direct appeal, this Court asked the parties to file

additional memoranda discussing the relationship between a suit to enjoin and an action to set aside an ICC order, and discussing whether an action to set aside an ICC order must be determined by a three-judge court. The government responded to this request in a Supplemental Memorandum[4] which urged that, for the purpose of the three-judge court provisions (necessarily including the direct review provisions), suits to enjoin or to set aside ICC orders are functionally equivalent.[5] The Court apparently agreed with this reasoning, evidencing its conclusion that it had jurisdiction of the case on direct review by affirming the district court's order (401 U.S. 967). Similarly, here the three-judge district court's judgment vacating the Commission order, reopening the proceeding, and remanding the case to the Commission, is properly before this Court on direct review.

For the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission.

OCTOBER 1974.

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[4]We are sending appellees a copy of this memorandum.

[5]This equivalence is evident in the present case, for example, in which the district court specifically ordered that "Ex Parte No. 281 is to be reopened for further proceedings consistent herewith" (J.S. App. 50a). Thus, under the district court's order, the Commission cannot terminate its proceeding without complying with the court's highly detailed directives concerning the environmental impact statement. For all practical purposes, therefore, the Commission is in the same position as if the court had in terms issued an injunction requiring it to take such action. And it is, of course, immaterial for purposes of this Court's appellate jurisdiction under 28 U.S.C. 1253, whether such an injunction is properly characterized as interlocutory or permanent.